IN THE SUPREME COURT OF THE TERRITORY OF HAWAII.

DECEMBER TERM, 1900.

M. G. SILVA *v.* CHARLES S. DESKY, doing business as BRUCE WARING & COMPANY.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

SUBMITTED DECEMBER 31, 1900. DECIDED MARCH 6, 1901.

FREAR, C.J., GALBRAITH, J., AND LORRIN ANDREWS, ESQUIRE, OF THE BAR, IN PLACE OF PERRY, J., DISQUALIFIED.

An action for damages for breach of contract of sale of real estate may be maintained on a written instrument signed only by the party sought to be charged.

The necessity of tender by one o the parties to an executory contract is waived where prior to default on his part the other party to the contract places it beyon his power to perform.

OPINION OF THE COURT BY GALBRAITH, J.

The action was for damages for breach of contract. It is alleged that the plaintiff agreed to purchase of the defendant three certain lots at Puueo, Hilo, Island of Hawaii, for four hundred dollars each and that $150.00 of the purchase price was paid at time of entering into said contract and at the same time defendant executed and delivered to the plaintiff a certain instrument in writing in words and figures following to wit:

"150.00. Honolulu, August 25, 1896.

Received from M. G. Silva the sum of one hundred and fifty dollars being a preliminary payment to secure lots 11, 12, 13 in block 2 of the land known as Puueo, situated in Hilo, Hawaii, H. I., and lately sold by the Hilo Sugar Company to Bruce Waring & Co., the purchase price for said three lots being twelve hundred dollars. This deposit binds the vendors only as follows:—Possession of land not to be given until the same is surveyed which shall not be later than March 1st 1897 when agreement of sale will be executed for balance of purchase money of one thousand dollars pabable in six and twelve month with eight per cent. interest from March 1st 1897 to be paid as follows:—the further sum of two hundred and fifty dollars on delivery of said agreement of sale: four hundred dollars on August 1st 1897, and the balance of four hundred dollars on February 1st 1898, when a Warranty Deed for the above described lots will be given. Vendors do not bind themselves to the size of lots which are shown on a map of said land now in the office of Bruce Waring & Co. in Honolulu and F. M. Wakefield, in Hilo.

Bruce Waring & Co."

That without notice to the plaintiff or any attempt to perform the contract with him, defendant sold said lots to other parties for five hundred dollars each or for three hundred dollars more than the price plaintiff was to pay for them.

The defendant in his answer pleads the general issue and gives notice that he "intends to rely on the defense of release." A trial was had to a jury and a verdict returned for the plaintiff for $486.00, this being for the $150.00 paid and for the $300, the advance in the price at which the lots were sold and interest thereon from commencement of suit to date of judgment at the rate of 6% per annum.

The defendant comes up on exceptions.

The first is to the following question asked of the plaintiff "State whether or not you agreed to purchase from Mr. Desky certain lots of land in Puueo, Hilo?"; and the second is to the overruling defendant's objection to the admission in evidence of the written instrument above quoted. The question was a proper one and the writing was competent and relevant and properly admitted.

At the close of plaintiff's case the defendant moved for a nonsuit on the ground "that the evidence showed that the contract entered into between the parties was unilateral and that the plaintiff was not bound by it and has done nothing since the making of the contract by which he became bound thereby." This motion was denied and exception taken.

We think that the motion was properly denied. The question presented by the motion was not as suggested by counsel for defendant, whether the contract made between the plaintiff and defendant was bilateral or unilateral but was it such a contract, or the memorandum thereof, as bound the defendant, the party sought to be charged.

It is further objected that at the close of the evidence the court instructed the jury in part as follows: "I charge you that you must find the following as facts: That on August 25th 1896, the defendant agreed to sell to the plaintiff three lots in question for the price of $1200.00 upon the terms as to payment stated in the instrument on file; that at that time plaintiff paid Desky $150.00 on account of the purchase price of the lots and therefore I have said it is an agreement of sale and not an option that was given in August, 1896, by the defendant to the plaintiff; further that the defendant has committed a breach of the agreement unless you find that there was a surrender or release by the plaintiff."

This instruction it seems correctly construes the writing as understood by the parties at the time of its execution. Both plaintiff and defendant testify that the defendant agreed to sell the lots and plaintiff agreed to buy them at the price and on terms set out in the writing signed by the defendant. Although the latter part of the instruction is not a full statement of the law, it possibly is as full a statement as was required under the issue presented by the pleadings and the evidence.

The instruction as to the measure of damages was a correct statement of the law as applied to this case.

While the instructions requested by the defendant and refused by the court were, we think, in the main, correct as abstract propositions of law, they were not in harmony with the issue or the evidence and were properly refused.

The court in construing the written instrument properly held that the $150.00, receipt of which is acknowledged therein, was not paid for the privilege of "exercising the right to accept" the lots when offered at a later date but was a part performance on his part and a payment on the purchase price.

Whether this writing signed only by the defendant was a unilateral or a bilateral contract does not seem to be important or material to determine since it is signed by the party sought to be charged and that is sufficient for this controversy under the rule announced by the Supreme Court of the Republic of Hawaii, in *People's I. & R. Co. v. Haw. Electric Co.*, 9 Haw. 435. The same rule was announced and followed by the Supreme Court of California in an action on a written instrument similar to that involved in this case. *Dennis v. Strassburger*, 26 Pac. Rep. 1070.

It seems that the question, whether under the contract as a condition precedent to bringing his action the duty was not incumbent on plaintiff to tender the $250., due on the completion of survey and demand the further agreement of sale mentioned in the writing of August 25th 1896, is answered by the assertion that the defendant notified him that the lots would not be surveyed by March 1st and that he would be notified when they were surveyed and that the next notice he had from the defendant was that the lots had been sold to other parties and that as the defendant had placed it out of his power to perform the contract a tender on behalf of plaintiff was thereby rendered useless and unnecessary. The defendant seems to have relied wholly on the defense of release. The questions of fact, involved in these respective issues were properly submitted to the jury for determination. The jury found for the plaintiff. In order to do this it was necessary for them to find in favor of his contention of the facts and against those of the defendant.

The exceptions are overruled.

Robertson & Wilder for plaintiff.

Kinney, Ballou & McClanahan and *H. A. Bigelow* for defendant.

WILL SUCCEED THE COLEMANS

The withdrawal of Mr. and Mrs. H. E. Coleman from their active Christian work in Honolulu the last of May will be regretted by very large circles of friends, and their places are not easy to fill. The directors of the Young Women's Christian Association considered only one candidate, and were unanimous in the choice of Mrs. Edith A. Brown, who was one of the ladies most interested in the formation of the association, and one of the board of directors. Mrs. Brown is a native of Clinton, New York, where she studied and taught in Houghton Seminary, and later taught in Philadelphia, Los Angeles, Salt Lake City and Chicago. In the latter city she was later employed by the Young People's Society of the Third Presbyterian Church as its city missionary. After becoming a New Englander she became well known among the Congregational young people of Massachusetts as an enthusiastic speaker on missionary topics, especially after taking a trip through the Southern States, visiting the schools of the American Missionary Association, by whom she was employed to speak in the cities and towns of Massachusetts.

Mr. Henry Champion Brown, who has just accepted an invitation to serve the Young Men's Christian Association for the rest of the year as general secretary, is a New Englander; born in Connecticut in 1867, educated in the schools of New Haven and at Williston Seminary. As president of the Y. M. C. A. at the seminary, he attended college Y. M. C. A. conventions and summer schools at Mount Hermon and Northfield, where he became familiar with Y. M. C. A. work and workers. Later he was librarian of the Boston Y. M. C. A. until he moved into a suburb, where he helped to start the Melrose Y. M. C. A.

Mr. Brown then had a few years of business experience, which will be valuable to him in this work. Feeling the need of more special training for religious work, he took a two years' course at the Bible Normal College, in Springfield, Mass. On graduating he was called to assist in the work of the Old South Church of Worcester, a church of over a thousand members, from which church he was called to do a similar work at Central Union. His resignation there will take effect April 1st, giving him time for a vacation, and for study and practice before assuming the reins, the last of May.